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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 783

ORMAN W. EWING,

Petitioner,

vs.

NATIONAL AIRPORT CORPORATION.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT AND MOTION THAT PETITION BE CONSIDERED ON APPENDICES TO BRIEFS PRINTED FOR THE USE OF THE CIRCUIT COURT OF APPEALS.

WILLIAM E. LEAHY,
WILLIAM J. HUGHES, JR.,
NICHOLAS J. CHIASCIONE,
Counsel for Petitioner.

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OCTOBER TERM, 1940

No. 783

ORMAN W. EWING,

Petitioner,

vs.

NATIONAL AIRPORT CORPORATION.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

Petitioner respectfully prays for the issuance of a Writ of Certiorari to review the judgment below.

Jurisdiction.

The judgment below was entered November 12, 1940 (R. 62). An extension of time of ten days within which to apply for Certiorari was granted by the Honorable Chief Justice of the United States February 12, 1941, the extension being for ten days from February 12th, 1941 (R. 63).

The jurisdiction of this court is invoked under Sec. 240(a) of the Judicial Code as amended by the Act of February 13, 1925 (28 U. S. C. A., Sec. 347(a).)

Opinion Below.

The opinion below will be found at R. 58. It is reported in 115 F. (2d) 859.

Statement.

Petitioner sued the National Airport Corporation in the District Court for the Eastern District of Virginia on a *quantum meruit* and got a verdict of $8,750.00, which the trial court (Judge Way) set aside on the ground that the work done involved objectionable lobbying. The National Airport Corporation had employed petitioner on a contingent fee basis to get the Government to remove a military road which bi-sected the Washington Airport just across the Potomac River in Virginia. This was to be accomplished either by buying the road from the Government or in any other way possible. Ewing, petitioner, interviewed the War Department which was entirely agreeable and, indeed, anxious to sell the military road. Unfortunately, however, it turned out they could not do it without legislation. The War Department and Ewing, petitioner, thereupon drafted a Bill which was introduced in Congress and which Ewing was instrumental in getting passed. The first Bill was vetoed by the President but another Bill was introduced two sessions later and passed. The President signed it and the road was thereupon sold to the Airport for $25,000. This was completely satisfactory to Respondent and the War Department but Respondent refused to pay Ewing for his work.

Ewing sued on a *quantum meruit* and the jury awarded him $8,750 but, as said above, the trial court set it aside on the ground that Ewing's "lobbying" was against public policy. The Circuit Court of Appeals affirmed on the theory

that Ewing in securing passage of the Bill used personal and political influence. The Court said:

> "As a former member of a national political committee he was in Washington doing lobbying work. He promised certain senators to exert political influence for them in their home states in return for their help in the passage of the legislation he was favoring. He repeatedly admitted this in the letters he wrote and in the testimony he gave in the trial of the case. While the legislation may have been meritorious and while the plaintiff may have done nothing more than return personal favors for help in securing the passage of the bill he was advocating, he may not come into a court and enforce payment for his services before the Congress."

It is conceivable that the Court below might thus refer to Ewing's activities with respect to the *first* Bill which Congress passed but, as said before, the first Bill was vetoed. Ewing was suing for a *quantum meruit,* not for services rendered with respect to the *first* Bill which was vetoed but with respect to the *second* Bill, introduced two sessions later, which was not vetoed but which the President signed and which became law. It cannot be assumed that the jury gave the Petitioner $8,750 for activities in getting a Bill passed that produced nothing. On the contrary the presumption must be that their verdict was for his services in connection with the Bill that finally became law. Counsel in arguing the case to the jury was careful to ask no recovery whatever for plaintiff's services with regard to the first Bill. Likewise the trial Court instructed the jury that the first contract had been terminated upon the veto of the first Bill in September, 1937, and that this was acquiesced in by the plaintiff (R. 30-31). This is important for the reason that the entire record will be searched in vain for any evidence whatever as to any objectionable activities by Ewing in connection with the second Bill. The only testi-

mony relating to what Ewing did with respect to the *second* Bill is found at page 24 of the stenographic transcript on file in this court (R. —) which is as follows:

> "Q. Without going into too much detail, Mr. Ewing, will you generally outline for the jury what your course of work was in connection with that second bill?
>
> A. I did a tremendous amount of work on that, by contacting every member of both the House and Senate that I could reach, regardless of their committee connection. Mr. Solomon had an aerial picture of the airport made, and had it printed on a double page in Life magazine, and he bought, I don't know how many of those magazines. But the write-up, and so forth—the aerial picture, a double page picture,—it just about told its own story of that road going across there. I used that to a great extent to convince Congress—there were only 500 members of Congress—that this thing should be done, as a public duty—to take that road out of there. I used that magazine and contacted these people, and gave them a copy of it and other information. I wrote a great many letters to different congressmen and senators who asked me questions during the conversations, and told me to answer by letter. But we did not work under the high pressure we worked the first time."

In spite of the above the court below made no distinction whatever between Ewing's services with regard to the first Bill which was vetoed and for which he asked no recovery whatsoever, and his services above described on the second Bill which became law and which accomplished what the Airport and the War Department wanted. Even assuming that Ewing's activities with regard to the first Bill consisted of objectionable personal solicitation, (we believe they did not), there is literally no evidence whatever in the record upon which the trial court could deprive plaintiff of his verdict for the work set forth above.

Questions Presented.

Upon the above statement, two serious questions are presented:

(1) Whether the trial court and the court below, with no evidence whatever in the record showing any objectionable activity with regard to the second Bill, can indulge in surmise and go out of its way to set the verdict aside;

(2) Entirely aside from the above, has a Federal Court in a case arising solely by reason of diverse citizenship, the right to impose its own ideas of public policy upon the plaintiff in order to deprive him of a jury's verdict? Is it not the public policy of the State of Virginia which the Federal Court must apply—at least in the absence of a showing of such gross and unconscionable conduct that no court of justice could entertain the case? Lacking such an overwhelming showing, does the failure of the courts below to follow the Virginia law amount to a violation of this Court's ruling in *Erie R. R. Co.* v. *Tompkins*, 304 U. S. 64?

Reasons for the Allowance of the Writ.

We venture to say that hardly any case can be found wherein a court has gone more out of its way to set aside a verdict of a jury on the basis of surmise and speculation than the present case. There is literally no evidence in the record of any objectionable activities by Ewing to get the second bill passed. It follows that the trial court was entirely unjustified in setting aside the verdict. As the court below approved this the case presents an entire failure to preserve the spirit of Rule 50 of the New Rules of Civil Procedure relative to the court's power to set aside a verdict returned by a jury.

In so doing the court below has certainly departed from the accepted and usual course of judicial proceedings or

sanctioned such a departure on the part of the trial court within the meaning of this Court's Rule 38, Subdivision 5 (b).

Setting aside a verdict on the ground of public policy is judicial legislation unless the public policy is (a) certain and determined, and (b) the case shows a clear violation of it. It certainly cannot be the law that in close or doubtful cases a person's contractual rights (a species of property protected by the Fifth Amendment) can lightly be set aside by a Federal Court because that court may have advanced or even ultra-laudable notions of public policy. The Virginia law is very much opposed to courts setting aside contracts as illegal on the ground of public policy, "unless the case is free from all doubt" (*Aetna Life Ins. Co.* v. *A. C. L. R. Co.* (C. C. A. 4th), 79 F. (2d) 463, 467); *Brown* v. *Stevens*, 61 Va. 296. The Virginia courts have likewise held in *Smyth Bros.* v. *Beresford*, 128 Va. 137, that "an intention to violate the law or morals is not to be presumed." In *Old Dominion Transportation Co.* v. *Hamilton*, 146 Va. 594, the transportation company wanted to cancel a lease with the City of New York. It did what any practical businessman would do, i. e., it employed a New York politician to take the matter up with the City of New York. Had the two courts below been presented with this case they would have made short work of it on the surmise that there must be something deep-dyed and nefarious in employing a man who knew the city officials of New York to get them to cancel the lease. The Virginia courts, however, took no such view and said very sensibly that it was not illegal for the company to get all the help it could from politicians. It likewise held that whether Hamilton had done anything improper in so doing was a question of fact for the jury to determine and in the present case the jury, in effect, determined it.

The Federal cases cited by the court below are all inapplicable due to *Erie R. Co.* v. *Tompkins, supra.* This

Court was careful in *Erie R. Co.* v. *Tompkins*, and the subsequent cases based upon it, to restrain illegal Federal excursions into the domain of State law. We believe the present case presents another such instance, particularly objectionable because it is in the shadowy area of public policy, uncertain and undeclared in the best of cases, and clearly misapplied in the present case.

The policy of the Federal Courts ought to be as announced in *Brown* v. *Gesellschaft*, 70 App. D. C. 94, 104 F. (2d) 227, and reflected in this Court's opinion in *Steele* v. *Drummond*, 275 U. S. 199, 205, to the effect that courts naturally should be reluctant to permit a corporation which has received the benefit of a man's services to hide behind a doctrine of public policy when it comes to paying for them. Particularly is this so in the present case wherein all the plaintiff was doing was to help the War Department to get a Bill through Congress which the War Department itself wanted passed. The Bill was not "favor" legislation, condemned in *Gesellschaft* v. *Brown*, 78 F. (2d) 410. It was not a private act for the relief of respondent—it was a Public Act and entitled as such: "Public No. 481, 75th Congress, Chapter 142—3rd Session."

Conclusion.

The Petition should be granted.

Respectfully submitted,

ORMAN W. EWING,
Petitioner.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 783

ORMAN W. EWING,

Petitioner,

vs.

NATIONAL AIRPORT CORPORATION,

Respondent.

MOTION FOR LEAVE TO FILE PETITION FOR WRIT OF CERTIORARI ON RECORD IN THE CIRCUIT COURT OF APPEALS.

Comes now petitioner, and moves this Honorable Court to be allowed to present his petition for a Writ of Certiorari on the Record as constituted in the Circuit Court of Appeals for the Fourth Circuit, together with the proceedings in that court, including the opinion and judgment.

Petitioner respectfully shows that the Record below was in accordance with Rule 10 of the Rules of the Circuit Court of Appeals for the Fourth Circuit, reading as follows:

> "1. Unless ordered by the court, it shall not be necessary to print the record on appeal or on a petition for review of or enforcement of an order, except that the appellant or petitioner shall print as a part of the sup-

plement or appendix to his brief, the judgment, decree or order appealed or sought to be reviewed or enforced, together with any opinion or charge of the court, board or commission. If the record is printed, without order of court, the cost of printing shall not be taxed as costs in the case except in cases where for special cause shown the court shall otherwise order."

"(e) An appendix (or supplement to the brief) which, in addition to what is set out in section 1 above, shall contain such parts of the record material to the questions presented as the appellant or petitioner desires the court to read."

Pursuant to the above Rule petitioner docketed below the entire Record in the case, including the stenographic transcript of all the testimony. Likewise petitioner (appellant below) presented the material parts of the testimony as an appendix to petitioner's brief below. Respondent, appellee below, did the same.

Respondent, now, however, refuses to stipulate that this Court may consider the petition for a Writ of Certiorari herein on the Record in the Circuit Court of Appeals, including the proceedings in that court. That Record has already been filed in this Court and includes the entire Record in the Circuit Court of Appeals, including the stenographic transcript of all the testimony, plus the proceedings in that court, including the opinion and the judgment. Petitioner asked respondent, by stipulation, to permit the present Petition for a Writ of Certiorari to be heard upon the basis of the entire Record below being physically filed in this Court, so that this Court might have recourse to it, if necessary, but printing only the proceedings *in* the Circuit Court of Appeals, plus the appendix of appellant and the appendix of appellee below, containing the testimony that both appellant and appellee below considered material.

Unless this Court grants the present Motion it is obvious that Rule 10 in permitting cases to be heard without printing the entire Record, printing only material portions, by way of appendices, is largely useless. A respondent can effectually destroy petitioner's capacity to ask review by Certiorari simply by refusing to stipulate, as in the present instance, and compelling petitioner to print the entire record in the Circuit Court of Appeals. If a respondent has this power it is obvious that there is no use in attempting to abridge the record below by means of appendices. Instead, unless Certiorari is out of the question (and there is no way to tell this when the Record is docketed in the Circuit Court of Appeals), appellant below might as well face in the beginning the necessity of printing the entire record before he undertakes to present his case in the Circuit Court of Appeals. Thus, the appendix method of presenting records in the Circuit Court of Appeals might as well be abandoned.

It would appear, too, that a respondent who refuses to stipulate that this Court may consider Certiorari on the Record below, printing only the appendices and proceedings in the Circuit Court of Appeals, is acting harshly. After all, the respondent has already printed below the important parts of the Record, and if these were good enough to win in the Circuit Court of Appeals it would seem that they would likewise be good enough to present adequately the case in this Court.

Respectfully submitted,

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IN THE

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OCTOBER TERM, 1940

No. 783

ORMAN W. EWING, *Petitioner*,

v.

NATIONAL AIRPORT CORPORATION

BRIEF OF NATIONAL AIRPORT CORPORATION IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIOARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

NATIONAL AIRPORT CORPORATION,
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In the Supreme Court of the United States

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NATIONAL AIRPORT CORPORATION

BRIEF OF NATIONAL AIRPORT CORPORATION IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIOARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

Statement

In the statement of the petition, counsel for the petitioner seeks to divide into two parts the services rendered by the petitioner, practically admitting that he did lobbying work for the first Bill which was vetoed by the President but that he had avoided any lobbying in connection with the second Bill which became a law by the President's signature.

It plainly appears in the Transcript of Record (pp. 38-39-40), in Defendant's Exhibit No. 6 (pp. 45-46-47), in

Plaintiff's Exhibit No. 1 (pp. 48-49), in the Re-Cross Examination of Ewing (pp. 50-51-52) and in Plaintiff's Exhibit No. 2 (p. 53) that the work alleged to have been done by the plaintiff was all a part of the same transaction for which he sought compensation in the suit, and that the plaintiff was engaged in lobbying during the entire time.

The statement in the petition (referring to the vetoed Bill), that it cannot be assumed that the jury gave the petitioner $8,750 for activities in getting a Bill passed that produced nothing, can be readily answered by saying that neither can it be assumed that the jury awarded the petitioner this large amount for assisting in getting a Bill through which allowed or rather required the defendant to purchase a road for $25,000, which road was already closed for all practical intents and purposes by Public Resolution No. 75, 74th Congress, shown as Defendant's Exhibit No. 10 (Transcript of Record, pp. 54-55).

Counsel for defendant does not recall any effort to divide the claim into two separate and distinct parts until this case reached the Circuit Court of Appeals for the Fourth Circuit, which court promptly ruled that it was all one transaction. If, however, this is a matter of any importance in connection with the petition of the plaintiff, it clearly appears from the record that the petitioner did objectionable lobbying work in connection with the second Bill as well as the first, as shown on pages 39-40 of the Transcript of Record.

On page 39 he testified that he had contacted practically every member of Congress, that he had used a picture contained in Life Magazine in contacting approximately 500 members of Congress; that he wrote a great many letters to different Congressmen and Senators who had asked him questions and told him to answer by letter. He further testified that on the day he had the final meeting with a representative of the defendant at the Airport, the Camp Springs Bill was before Congress (that being a proposed site for another airport near Washington), and that this

site was recommended by the Airport Commission to appropriate money for building an airport some 10 or 12 miles from Washington. He used the following language in describing his activities:

> "'We' had done a lot of work trying to keep the airport where it was instead of having it go down to Camp Springs; that 'we' helped to prepare it all. 'We' were ready for it when 'we' held it back until the President signed this Bill. By the way, I worked the Senate membership three days to get the President to sign the Bill."

In Defendant's Exhibit No. 6 (p. 49), being a letter written by the plaintiff from Salt Lake City on September 12, 1937 (about the middle of page 46 of the Transcript of Record), plaintiff wrote as follows:

> "I think you are aware that I put myself under deep obligation to King to induce him to get out of the way. That is part of lobbying. You, as a young man, may not realize that almost everything done in Congress is a trade. You despise the whole mess, maybe justly so, but you should not show your contempt. I am obligated to O'Mahoney, Copeland and Burke for assistance rendered. Do you think it quite fair for me, for the sake of a few hundred dollars retainer to desert me and force me to fulfill these obligations on my own?"

Counsel for plaintiff in their petition states that two serious questions are presented:

> (1) Whether the trial court and the court below, with no evidence whatever in the record showing any objectionable activity with regard to the second Bill, can indulge in surmise and go out of its way to set the verdict aside;

(2) Entirely aside from the above, has a Federal Court in a case arising solely by reason of diverse citizenship, the right to impose its own ideas of public policy of the State of Virginia which the Federal Court must apply—at least in the absence of a showing of such gross and unconscionable conduct that no court of justice could entertain the case? Lacking such an overwhelming showing, does the failure of the courts below to follow the Virginia law amount to a violation of this Court's ruling in *Erie R. C. Co.* v. *Tompkins,* 304 U. S. 64?

Reasons for Refusal of Writ

An examination of the Transcript of Record will, we think, answer the *first question* without the slightest shadow of a doubt. Both State and Federal Courts have passed on the question of lobbying contracts in numerous cases, and the following rules or principles have been thoroughly established by the Supreme Court of the United States, by all other Federal Courts, and by a great majority of the State Courts:

1. If the agreement or contract is one to procure by lobbying service, if possible, the passage of legislation, then the contract is void.

2. An agreement, express or implied, for merely professional services, such as drafting a petition to set forth a claim, attending to the taking of testimony, collecting facts, preparing arguments, and submitting them orally or in writing to a committee or other proper authority is valid.

3. The courts will closely scrutinize any contract, express or implied, where a contingent fee is involved in matters pertaining to legislation, as the courts have held repeatedly that when a contingent fee is involved in contracts of this sort, the temptation is great to go

beyond legal limits in order to put through the desired legislation.

4. If any part of the contract requires "lobbying", then the whole contract is void, as the courts will not undertake to separate the good from the bad in contracts of this nature.

The following cases, we submit, are absolutely decisive of the case at bar: *Marshall* v. *Baltimore & Ohio Railroad Company*, 57 U. S. 314 (14 Law Ed. 953); *John W. Burke, Executor of Nicholas P. Trist* v. *Linus M. Child*, 88 U. S. 441 (22 Law Ed. 623); *The Providence Tool Co.* v. *Samuel Norris*, 69 U. S. 45 (17 Law Ed. 869); *George C. Hazelton* v. *Margaret R. Sheckels et als.*, 201 U. S. 71 (50 Law Ed. 939); *Noonan* v. *Gilbert*, 68 Fed. Rep., 2d Series, 775; and *Gesellschaft Fur Drahtlose Telegraphie M. B. H.* v. *Brown*, 78 Fed. Rep., 2d Series, 410.

As to the *second question* presented by the petitioner, we are unable to see that the decisions of the Supreme Court of Virginia have any bearing on the case, because it was the contention of the petitioner in the lower court that some form of contingent fee agreement was made with him by the Vice-President of the defendant in the City of New York. The work to be done by the petitioner was to be done in the City of Washington and the defendant is a non-resident corporation controlling the Washington Airport by stock ownership. If we assume, however, that the Virginia decisions have any bearing on the case, it is difficult to understand how counsel for the petitioner can get any comfort from that.

In the case of *Old Dominion Transportation Co.* v. *Hamilton*, 146 Va. 549, the Virginia Court in no way departed from the decisions rendered by the Supreme Court of the United States. This case was brought to the Supreme Court of Appeals of Virginia on account of the refusal of the lower court to grant an instruction reading as follows:

"The court instructs the jury that neither personal nor political influence is a vendible article in our system of law and morals, and if you believe from the evidence that the plaintiff used his personal and political influence to secure from the officers of the city of New York the use of pier 26 for the defendant or to secure a lower rental of pier 31 for the defendant than could have been secured by an ordinary business man without any special personal or political influence, then the courts of this Commonwealth will not assist him in securing compensation for such services and your verdict should be for the defendant."

On page 615 the court said regarding this instruction:

"The instruction tendered was too unqualified a statement of the law to be warranted by the evidence. It should have been modified by a statement of the character of the influences personal and political which would vitiate a contract or a recovery upon a *quantum meruit*, and so modified it should have been given. It should have told the jury that the contract in evidence is not against public policy nor illegal on its face, and that the burden of showing it to be against public policy or illegal was upon the defendant *unless either of these infirmities appear from the plaintiff's own testimony.*" (Italics mine.) "When the defendant had shown this by a preponderance of the evidence, the plaintiff could not recover. It should further have told the jury that if it believed from the evidence that either personal or political influence were brought to bear, and that the city authorities were asked to decide the controversy in favor of the transportation company for personal or political reasons, there could be no recovery.

"On the other hand, even if the jury believed from the evidence that either personal or political influence was exerted by the plaintiff, but merely to secure a hearing from the city authorities, and an opportunity to present the matter in issue upon its merits, and that when such opportunity was secured the case was presented upon its merits and upon its merits alone, then

in that event the jury should have been told that the plaintiff was entitled to a judgment."

In the case of *County of Campbell* v. *Howard*, 133 Va. 19, at page 62, the court in its opinion states in part:

> "The authorities very generally hold that a contract to pay for services to be performed in the endeavor to obtain or defeat legislation by other means than the use of argument addressed to the reason of the legislators, such as, for example, for the exertion of personal or political influence apart from the appeal to reason as applied to the consideration of the merits or demerits of the legislation in question, is an illegal contract," (citing *Trist* v. *Child*, 21 Wall. 441, and numerous other cases.)
>
> "As, however, as aforesaid, the contract in the case in judgment was merely for services consisting of the presentation of argument addressed to the reason of the legislators, the present case does not fall within such holding."

In the case of *Camp* v. *Bruce*, 96 Va. 524, the Supreme Court of Appeals of that State used this language as to the enforcement of illegal contracts:

> "If it be an illegal contract, as claimed in argument, this suit cannot be maintained, although that defense was not raised by the pleadings, nor relied upon in the Circuit Court. The law refuses to enforce illegal contracts, as a rule, not out of regard for the party objecting, nor from any wish to protect his interests, but from reasons of public policy. Whenever, therefore, the illegality of the contract appears, whether alleged in the pleadings or made known for the first time in the evidence, it is fatal to the case. That defect cannot be gotten rid of either by failure to plead it, or by agreeing to waive it in the most solemn manner. The law will not enforce contracts founded in its violation."

It should, of course, be noted, that the only two officers of the defendant with whom the plaintiff petitioner had any

contact were F. F. Russell in New York and S. J. Solomon in the District of Columbia, both of whom stated positively that they had no understanding or no knowledge of any agreement with the plaintiff other than the compensation of $500 per month to be paid him while he was employed by them. (Testimony of F. F. Russell, Transcript of Record p. 54; testimony of S. J. Solomon, Transcript of Record pp. 55-56-57.)

Conclusion

In conclusion, it is respectfully submitted that if there ever were a case where a lobbying contract is thoroughly established, it is the present case. Because of the fact that the information furnished to counsel for defendant by his witnesses and testfied to by them (Transcript of Record, pp. 54-55-56-57) to the effect that only one agreement had been made with the plaintiff, namely, to pay him $500 per month for such time as he was employed by the defendant, with the right on behalf of said defendant to terminate the plaintiff's services at the end of any month, no plea was filed on behalf of the defendant in its answer alleging lobbying. No plea having been filed alleged lobblying, the plaintiff testified throughout the trial in an endeavor to influence the jury as to the great amount of work which had been done for the defendant and the nature of the work done, and in so doing he clearly showed that he had done lobbying, for which, under the law, no recovery can be had. As soon as the testimony of the plaintiff developed the nature of the work done by him, counsel for the defendant made the usual motion for an instructed verdict and later moved the court to set the verdict aside and enter final judgment for the defendant, which motion the lower court sustained after exhaustive arguments and entered final judgment for the defendant.

The Circuit Court of Appeals for the Fourth Circuit unanimously affirmed the decision of the lower court, and we submit that the petition for certiorari should be refused.

Respectfully submitted,

NATIONAL AIRPORT CORPORATION,
Defendant.

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